Filed 4/8/19 P. v. Hamilton CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANNY HAMILTON, Defendant and Appellant.	F075220 (Super. Ct. No. 15CR02988) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine B. Chatman and Matthew A. Kearney, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Defendant Danny Hamilton challenges his convictions arising from his repeated sexual assaults of two minors. He argues the trial court erred in overruling his objection to the admission of a recording of one of the complainant's interviews with authorities pursuant to Evidence Code section 1360 because such statement was insufficiently reliable and violated his right to due process. He also contends the inclusion of CALCRIM No. 1190 reduced the prosecutor's burden at trial in violation of his rights to due process and a fair trial. He further argues the prosecutor engaged in misconduct by: (1) arguing that requiring a complainant to participate in the trial process constituted additional trauma and victimization, (2) appealing to jurors for sympathy, (3) arguing justice requires conviction, (4) vilifying defense counsel by stating defendant's position was an "insult," (5) improperly vouching for the credibility of the complainants, (6) shifting the burden of proof, (7) arguing facts not in evidence, and (8) eliciting and arguing the jury should consider victim impact evidence during the guilt phase of trial. To the extent any of his contentions were forfeited on appeal, defendant argues he received ineffective assistance of counsel. Finally, defendant asserts the trial court erred in imposing an unauthorized parole revocation fine.

We strike the imposed and suspended parole revocation fine and, in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Twelve-year-old Mariah testified defendant began molesting her when she was about eight or nine years old. Mariah testified defendant "put his private inside [her] behind, and also he made [her] suck his private." This happened multiple times. According to Mariah, her cousin K. once walked past and saw defendant abusing her; K. said he wished defendant "could just go to jail already and just leave us alone."[1] Mariah

[1] We refer to some of the witnesses by their first initial to protect the privacy interests of the victims. (Cal. Rules of Court, rule 8.90.)

would spend the night at the apartment of defendant and her grandmother, but she stopped going as often when the abuse began. Mariah did not tell anyone about the abuse because she was too scared. She denied she had been inappropriately touched when first asked by her mother, but she eventually told her mother the truth when she was asked again. Mariah recalled talking to Detective Raquel Rios about the abuse approximately two years before trial, and she averred she told Detective Rios the truth.

Detective Rios testified she investigates child abuse, molestation, and sexual assault cases and was trained to do interviews and interrogations related to child abuse. She explained a multidisciplinary interview center (MDIC) interview is a recorded interview conducted when a victim who is typically under the age of 12 reports sexual or physical abuse or has suffered some sort of traumatic event. A forensic interviewer interviews the victim in a "kid-friendly environment," first establishing some rapport to make the victim feel more comfortable talking about the incident. Detective Rios testified she conducted a forensic interview with Mariah in July 2015 during which a social worker questioned Mariah; Detective Rios observed through a monitor in a different room. At some point, Detective Rios entered the interview room because she was having problems hearing Mariah's responses and because Mariah "wasn't opening up to [the social worker] and she just seemed uncomfortable." Detective Rios then began to question Mariah. The court admitted the recording of Mariah's MDIC interview at trial.

Fourteen-year-old A., Mariah's cousin, also testified she was sexually abused by defendant. A. testified she and her older brothers, Charles and K., lived with their mother in Merced before moving in the summer of 2016. In Merced, they lived in a two-bedroom apartment with A.'s grandmother and defendant. A. slept in one bedroom with her grandmother and defendant, and her mother slept in the other bedroom. Charles and K. slept in the living room.

A. testified defendant first had sex with her when she was eight or nine years old, when she was in the fourth grade. A. was lying on defendant's bed with defendant and her brothers, and they were all watching a movie. There was a sheet over defendant and A., and he pulled down her pants and underwear and put his penis in her vagina. A. felt pain, started crying, and defendant stopped. A. went to the bathroom and saw blood. A. testified defendant continued to have intercourse with her every day while she was in the fourth and fifth grade, and he told her not to tell anyone. A. tried to push him away. Defendant also touched A.'s chest and vagina with his hands. When A. was in the sixth grade, she went to live with her aunt in Sacramento. Defendant continued to sexually abuse A. when he visited once a month. He touched her mouth with his penis. When A. moved back to her grandmother and defendant's apartment in Merced for her seventh-grade year, defendant continued to touch A. and have sex with her almost every day that year. Defendant would give A. money "[s]o that [she] wouldn't tell." One time, A. saw her brother K. walk past the room twice and look at her while defendant was abusing her; A. started crying because she thought she was going to get in trouble.

According to A., defendant last touched her inappropriately the night of the Merced County Fair in 2016, before A. went to live with her father and stepmother. After the fair, A. went to sleep in her mother's room, though her mother was not there. In the middle of the night she woke up to defendant touching her and her underwear had been taken off. A. told defendant to stop and tried to push him off of her, but he said no and "wouldn't get off." Defendant held A.'s wrists down and put his penis in her vagina.

A. recalled seeing defendant touch Mariah inappropriately in the bedroom while A. was present. Defendant got on top of Mariah, told Mariah "it wouldn't hurt," and then he "tried to put his private in her private." She also saw defendant touch Mariah a second time. He touched A. that same day.

A.'s 15-year-old brother K. testified that when he was 13 years old, he saw defendant and his sister A. "doing something." He walked into the room and saw

defendant and A. pull up their pants quickly. K. went to the living room and defendant came out, gave him $5, and told him, "'you can't tell because I'll get in trouble and your sister will get in trouble.'" K. did not respond and did not know what to do because he did not know if A. would get in trouble. After A. reported the abuse to her father, K. also told him what he had seen. K. testified he never saw defendant behave inappropriately with Mariah.

K. called defendant from the police station and the police recorded the call. The prosecution played the call for the jury. During the call, K. told defendant he had spoken to A. about seeing her and defendant in the bedroom and A. was going to tell their father about what happened. Defendant told K. to "tell her not to" and to "[s]top her" "[b]ecause that'll make everybody sad." K. said he felt bad and defendant responded, "I know. So do I. I feel bad also." K. asked defendant to promise he would not touch or have sex with A. anymore and defendant responded, "All righty," "I never will," "I'll be a good grandpa, all right," "[n]o more bad grandpa."

A.'s stepmother T. testified A. came to live with her and her husband C., A.'s father, in February 2006 until 2009. In 2009, A. went to live with her mother. A. moved back in with T. and C. in 2015. That June, C. and T. reported defendant's abuse of A. to police. T., who at the time was an advocate for the Valley Crisis Center and University of California, Merced, acted as an advocate for A. and went with her to get a medical examination.

Nurse practitioner Jaylene Osena testified she was working for the child abuse prevention treatment program and the advocacy clinic at Valley Children's Hospital in July 2015. In that capacity, Osena performed a sexual assault response team (SART) examination on A. She explained a SART exam is done on children or mentally delayed adults who may have been sexually abused. It involves a full physical examination and the collection of evidence. During the vaginal examination, Osena noticed a tear in A.'s hymen, which was uncommon and "indicative of sexual abuse" and "blunt force trauma."

Following the presentation of evidence, the jury convicted defendant of aggravated sexual assault of a minor by force (Pen. Code, § 269, subd. (a)(1); count 1), two counts of sexual intercourse/sodomy with a child under 10 years old (*id.*, § 288.7, subd. (a); counts 2 and 3), five counts of forcible lewd act upon a child (*id.*, § 288, subd. (b)(1); counts 4, 5, 6, 7, and 8), two counts of oral copulation/sexual penetration of a child (*id.*, § 288.7, subd. (b); counts 9 and 10), and two counts of oral copulation/sodomy with a child (*id.*, § 288.7, subd. (a); counts 11 and 12). The trial court sentenced defendant to consecutive terms of 15 years to life on counts 1, 3, 9, and 10, and consecutive terms of 25 years to life on counts 2, 11, and 12. The court then doubled defendant's terms on counts 1, 2, 3, 9, 10, 11, and 12 pursuant to section 1170.12 for a total of 270 years to life. The court also imposed five separate terms of life without the possibility of parole on counts 4, 5, 6, 7, and 8 (*id.*, § 667.61, subd. (j)(1)).

DISCUSSION

I. Admission of Recording of Mariah's MDIC interview

Defendant first challenges the trial court's admission of the recording of Mariah's MDIC interview.

A. Relevant factual background

Before trial began, the court noted "the MDIC interview of Mariah would come in as long as the requirements of Evidence Code 1360 are satisfied." Then, during trial, the court discussed the admissibility of the recording outside of the jury's presence, noting such evidence was being offered pursuant to section 1360.

The court noted that in the recording, before the social worker and Detective Rios began "questioning [Mariah] about the sex acts, they conducted preliminary questioning to see if Mariah understood the difference between the truth and something that was a fabrication or not true." They also "conducted an examination to determine her level of understanding as far as anatomy, according to her age level and conducted questioning to

determine her understanding basic language and terminology." The court concluded Mariah "appears to be a child of above average, intellect" and "she demonstrated [a] clear understanding of the importance and ability to tell the truth." She also "exhibited an understanding of anatomy that would appear to be appropriate for her age" and "her answers appear to be responsive to the questions."

The court recognized Mariah's trial testimony was generally consistent with her statements in the MDIC interview describing the events that occurred—including vaginal rubbing, sodomy, and oral copulation—and where and when they happened, though there were some inconsistencies in Mariah's statements about the number of times the abuse occurred and who was present. The court noted Mariah's demeanor in the MDIC interview was "a factor that probably supports reliability." It also found "no apparent influences from any outside sources or evidence of that." The court further acknowledged "[t]he MDIC interview environment is certainly conducive to enabling the child to feel more comfortable in having to describe things that occurred to [the child]."

Accordingly, the court concluded the MDIC interview "was reliable" and held it admissible under Evidence Code section 1360. Defense counsel did not expressly object, but he argued Detective Rios influenced Mariah by commenting at the beginning of the interview that "[Rios] was there to help and that [defendant is] in jail. Now [Mariah]'s safe."

The court concluded it did not "find [Detective Rios's comments] sufficient to find the entire interview is unreliable." It noted defense counsel could point out such comments in cross-examination and argue this to the jury. The prosecution then played the recording of Mariah's MDIC interview for the jury.

B. Standard of Review and Applicable Law

Evidence Code section 1360 provides in pertinent part:

> "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act

> of child abuse … performed with or on the child by another … is not made inadmissible by the hearsay rule if all of the following apply:
>
> "(1) The statement is not otherwise admissible by statute or court rule.
>
> "(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.
>
> "(3) The child … : [¶] (A) Testifies at the proceedings."

The California Supreme Court has identified the following nonexhaustive list of factors as being relevant to the reliability of hearsay statements made by a child witness in a sexual abuse case: (1) spontaneity and consistent repetition; (2) the declarant's mental state; (3) use of terminology unexpected of a child of a similar age; (4) lack of motive to fabricate; and (5) the child's ability to understand the duty to tell the truth and to distinguish between truth and falsity. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29–30; *Idaho v. Wright* (1990) 497 U.S. 805, 821–822, abrogated in part by *Crawford v. Washington* (2004) 541 U.S. 36, 60–62; see *In re Lucero L.*(2000) 22 Cal.4th 1227, 1250.)

"We review a trial court's admission of evidence under [Evidence Code] section 1360 for abuse of discretion. [Citation.]" (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367; see *People v. Waidla* (2000) 22 Cal.4th 690, 724.) A trial court has "broad discretion" in determining whether a party has established the foundational requirements for application of a hearsay exception. (See *People v. Martinez* (2000) 22 Cal.4th 106, 120.)[2]

---

[2]It has also been held that a trial court's findings concerning indicia of reliability are subject to independent review on appeal where the confrontation clause is implicated. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 296; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445–446; but see *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330 [applying abuse of discretion standard to trial court's finding hearsay statements were reliable for purposes of Evid. Code, § 1360].) Notably, the cases so holding cite *Lilly v. Virginia* (1999) 527 U.S. 116, 136 as authority for that proposition. In *Lilly*, however, the United States Supreme Court followed the standard set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, which conditioned the admission of

C. Analysis

Defendant argues the trial court erred in admitting the recording of Mariah's MDIC interview in violation of Evidence Code section 1360 and his due process rights because it was unreliable. He contends Detective Rios's comments at the beginning of the interview "injected unacceptable influence upon the declarant." He also argues "[c]ontradictions and improbabilities suggest that the MDIC statement was insufficiently reliable to be presented to jurors." He points to Mariah's statement during the MDIC interview that A. was on the bed during one incident of abuse; however, at trial, Mariah could not recall whether A. was ever present. He also notes A. said she saw defendant attempt to have vaginal intercourse with Mariah, but Mariah did not assert that occurred. Additionally, Mariah testified at trial that "all sexual conduct with [defendant] occurred in her grandparents' bedroom with the door open in a small apartment in which six people lived. She did not remember if people in one room could hear what people did in other rooms."

Here, even assuming without deciding defendant's challenge to the admission of the MDIC interview was adequately preserved, our independent review of the record supports the court's finding of reliability. The record reflects Mariah's descriptions during trial of the type of abuse and when and where it occurred were generally

---

hearsay evidence on whether it fell "within a firmly rooted hearsay exception" or bore "adequate 'indicia of reliability.'" (*Id*. at p. 66; see *Lilly v. Virginia*, *supra*, at pp. 124–125 (plur. opn. of Stevens, J.).) *Roberts* in turn was abrogated by *Crawford v. Washington*, *supra*, 541 U.S. at pages 60–62, thereby rendering *Lilly* "a dead letter" (*U.S. v. Smalls* (10th Cir. 2010) 605 F.3d 765, 773).

Where, as here, the hearsay declarant testifies at trial and is subject to cross-examination, the confrontation clause has no application at all. (*People v. Clark* (2016) 63 Cal.4th 522, 601.) Under these circumstances, the determination under Evidence Code section 1360 appears to be a matter of state evidentiary law reviewed like most other questions of admissibility, for abuse of discretion. (See *In re Cindy L.*, *supra*, 17 Cal.4th at p. 35 [applying abuse of discretion standard to admissibility of hearsay evidence under judicially created child dependency exception].) We need not make this determination since our conclusion in the present case would be the same under either standard.

consistent with her statements in the MDIC interview, which took place approximately a year and a half earlier. Like the trial court, we cannot conclude the inconsistencies between her trial testimony and the interview rendered the interview unreliable, particularly given Mariah's age, the traumatic nature of the events, and the effect of time on Mariah's ability to remember specific details. Mariah also testified at trial, so she was subject to cross-examination regarding her credibility and any alleged prior inconsistent statements. Additionally, defendant does not argue, nor do we find, there is evidence Mariah's mental state was in question or that she used unexpected terminology in describing the abuse. The record also does not reveal Mariah had a motive to fabricate her statements. Moreover, both at trial and during the MDIC interview, Mariah affirmed she understood the difference between the truth and a lie, and she agreed to tell the truth. Additionally, defendant has not provided any basis for us to conclude Rios's statements during the interview, in which she told Mariah that she was safe, rendered the MDIC interview unreliable. Thus, we cannot conclude the trial court erred in admitting such evidence or violated defendant's due process rights.

II. CALCRIM No. 1190 Does Not Reduce the Prosecutor's Burden

Defendant next contends the inclusion of CALCRIM No. 1190, which provides, "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone," reduced the prosecutor's burden at trial in violation of defendant's rights to due process and a fair trial.

A. Relevant Factual Background

The trial court included CALCRIM Nos. 301, 302, and 1190 in its instructions to the jury. Pursuant to CALCRIM No. 301, the trial court instructed jurors: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

This was immediately followed by CALCRIM No. 302: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Then, after instructing the jury on the elements of the sexual assault charges, the court instructed, pursuant to CALCRIM No. 1190: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." There is no evidence defense counsel objected to the inclusion of such instructions or requested any modification or clarification of them.

B. Standard of Review and Applicable Law

When a criminal defendant contends an ambiguous or potentially misleading instruction violated his or her federal due process rights, an appellate court must review the instructions as a whole and determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; accord, *People v. Smithey* (1999) 20 Cal.4th 936, 963 ["If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction"].)

The California Supreme Court has held CALCRIM Nos. 301, 302, and 1190 all correctly state the law. (See *People v. Gammage* (1992) 2 Cal.4th 693, 700 (*Gammage*) [discussing CALJIC No. 2.27, CALCRIM No. 301's counterpart, and CALJIC No. 10.60, CALCRIM No. 1190's counterpart]; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [discussing CALJIC No. 2.22, CALCRIM No. 302's counterpart]; Evid. Code, § 411 [except where additional evidence required by statute, direct evidence of one

witness entitled to full credibility is sufficient for proof of any fact].) In *Gammage*, the trial court instructed, pursuant to CALJIC No. 2.27: "'Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.' [Citations.]" (*Gammage*, *supra*, at p. 696, italics omitted.) The trial court also instructed, pursuant to CALJIC No. 10.60: "'It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.' [Citation.]" (*Gammage*, *supra*, at pp. 696–697.)

The California Supreme Court held it was proper to give the two instructions together in sex offense cases. (*Gammage*, *supra*, 2 Cal.4th at p. 702.) The court stated:

> "Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact … proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes. [¶] Because of this difference in focus of the instructions, we disagree with defendant … that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other." (*Id*. at pp. 700–701.)

C. Analysis

Comparing CALCRIM No. 1190 to CALCRIM Nos. 301 and 302, defendant argues "[t]he difference in instructions suggests that the cautionary part of CALCRIM No. 301 and CALCRIM No. 302 does not apply to CALCRIM No. 1190," and "reduces the burden of proof for sex-offense-complainant testimony." He acknowledges the

California Supreme Court held "the CALJIC predecessor instruction to CALCRIM No. 1190 did not improperly highlight or pinpoint a sex-offense complainant-witness's testimony" in *Gammage*, *supra*, 2 Cal.4th 693. But he contends the California Supreme Court "has not addressed the precise claim raised here."

Defendant's failure to object to, or seek clarification of, the instructions he now challenges forfeited his claim of error on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.) His claim also fails on the merits.

The crux of defendant's claim is that CALCRIM No. 1190, when juxtaposed with the cautionary language of CALCRIM Nos. 301 and 302, reduced the burden of proof applicable to the complainant's testimony. But the *Gammage* court expressly rejected the assertion that such an instruction, which dictates a substantive rule of law, creates a preferential credibility standard for a complaining witness in a sexual assault case. (*Gammage*, *supra*, 2 Cal.4th at p. 701.) It held when this instruction is given coupled with a cautionary instruction that guides the fact finder's review of the evidence, "'a balance is struck which protects the rights of both the defendant and the complaining witness,'" and it does not dilute the "beyond a reasonable doubt" standard or lead to an unfair trial. (*Id*. at pp. 700–701.) The court unequivocally stated, "The instructions in combination are no less correct, and no less fair to both sides, than either is individually." (*Ibid.*) We agree with and are bound by the court's conclusions and conclude they are dispositive of defendant's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we cannot conclude the court erred in instructing the jury on CALCRIM No. 1190 and find no violation of defendant's rights to due process and a fair trial.

Moreover, we do not view CALCRIM No. 1190 in isolation. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1075.) Rather, "[i]n assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled." (*People v. Tate* (2010) 49 Cal.4th 635,

696.) "Also, '"'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.) Here, jurors were instructed to "[p]ay careful attention to all … instructions and consider them together" and "judge the testimony of each witness by the same standards …." They were also instructed that the People must prove defendant guilty beyond a reasonable doubt. Taking these instructions into account, we cannot conclude it is reasonably likely jurors interpreted CALCRIM No. 1190 in the way defendant now contends.

Consequently, we reject defendant's contention.

III. Prosecutorial Misconduct

Defendant next challenges his conviction asserting the prosecutor engaged in numerous incidents of prejudicial misconduct.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44; see *People v. Mendoza* (2007) 42 Cal.4th 686, 700; *People v. Farnam* (2002) 28 Cal.4th 107, 167.) "The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor." (*People v. Mendoza*, *supra*, at p. 700.) "'A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

A. Forfeiture and Ineffective Assistance of Counsel

Defendant concedes his trial counsel lodged no objections to any of the prosecutor's conduct he now challenges on appeal. "'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) An exception is made if a timely objection or request for admonition would have been futile or if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*) "The reason for this rule, of course, is that 'the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.' [Citation.]" (*People v. Green* (1980) 27 Cal.3d 1, 27, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239.)

Alternatively, defendant contends his trial counsel rendered ineffective assistance of counsel (IAC) for failing to object to the prosecutor's challenged comments below. To prove IAC, a defendant must satisfy the two-part test of *Strickland v. Washington* (1984) 466 U.S. 668 requiring a showing of counsel's deficient performance and prejudice. (*Id.* at p. 687.) As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Id.* at p. 688.) The prejudice prong requires a defendant to establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*) Prejudice must be affirmatively proved. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Where a defendant fails to show prejudice, a reviewing court may reject a claim of ineffective assistance of counsel without reaching the issue of deficient performance. (See *Strickland,* at p. 697.)

As we explain *post*, defendant has failed to establish the prosecutor engaged in prejudicial misconduct, that an objection would have been futile, or that an admonition could not have cured the harm. Accordingly, the claims are forfeited on appeal. In addition, defendant fails to establish that trial counsel provided IAC because he fails to show deficient performance or prejudice.

B. Comments About Nature of Complainants' Testimony

Defendant first challenges the prosecutor's comments in opening statement and rebuttal argument during which she emphasized the complainants' ages and the difficult nature of their testimony.

1. Relevant Factual Background

During her opening statement, the prosecutor noted the circumstances under which the complainants would be testifying:

> "This week, you'll hear from A[.], who's now 14, and from Mariah who's 12 years old. We're going to ask a lot of the victims during this trial. They'll be asked to come to this courtroom of strangers to sit at that witness stand behind me across from the defendant and to answer questions. And there are going to be a lot of questions asking them about the single greatest trauma of their relatively young lives. And I believe you might see signs during this trial that we're asking too much of them. You're likely to see them struggle, perhaps in different ways to make sense of and articulate exactly how this defendant repeatedly sexually abused them."

During her rebuttal argument, the prosecutor reiterated the nature of Mariah and A.'s testimony:

> "We were asking these girls, 12 and 14 years old, to not only talk about some things that had happened years ago over an extended period of time, but to talk about the most heinous things that you could think about in a courtroom of strangers and to answer for why they didn't say anything, to have questions asked of them that made it like they were ridiculous that this would happen in the bed with other people. And those girls didn't waiver [*sic*]. They didn't remember the details. They likely suppressed many of the details, but they were not sure. They were sure about what happened."

2. Analysis

Defendant argues the prosecutor's referenced statements improperly urged "jurors to be swayed in favor of conviction based upon sympathy for [the complainants]." He contends "[t]he trial court bore a gatekeeper's sua sponte duty to remedy prosecutorial misconduct" and it violated defendant's right to procedural due process because it did not control the prosecutor's arguments. Because we find no misconduct, there was no sua sponte duty to interject a remedy.

First, the cited portions of the prosecutor's opening statement were not improper. "'The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present….' [Citation.]" (*People v. Farnam*, *supra*, 28 Cal.4th at p. 168.) It is also intended "to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) "'Nothing prevents the [opening] statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way. Although it is generally improper to ask jurors to step into the victim's shoes and imagine his or her suffering [citation], the prosecutor is not prohibited from identifying traits that made the victim particularly vulnerable to attack where such facts bear on the charged crimes and are not otherwise inadmissible on their face. [Citation.]' [Citation]." (*Farnam*, *supra*, at p. 168.)

Here, the prosecutor's referenced comments in opening prepared the jury for the nature and circumstances of the complainants' anticipated testimony, including potential difficulties and gaps in their testimony. Such comments were proper and did not amount to misconduct. (E.g., *People v. Dennis*, *supra*, 17 Cal.4th at p. 518 ["Although the prosecutor's language was dramatic, her otherwise proper opening statement did not become objectionable because she delivered it in a manner meant to hold the jurors' attention. [S]ome comment on the murders' effect on [the victim's young daughter] was reasonably necessary and unavoidable to prepare the jury for the difficulties and gaps in

her testimony. The circumstances of the killings and their impact on [the victim's young daughter] would be obvious to the jury in any event"].)

Additionally, the prosecutor's referenced rebuttal argument was also proper. """"""[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations] …" [Citation.] "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets ….'"" [Citation.]""" (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) Here, Mariah and A. testified regarding the repeated nature of the abuse and were questioned regarding why they did not report it earlier and the proximity of others in the apartment when the abuse occurred. Thus, the referenced comments were fair comments on the evidence, and counsel's "vigorous" argument did not constitute misconduct.

C. Alleged Appeal to Jurors for Sympathy

Defendant next argues the prosecutor committed misconduct by appealing to the jurors for sympathy for the victims in violation of defendant's right to due process.

1. Relevant Factual Background

During her closing argument, the prosecutor argued defendant "was a violent, sexual predator who stole from Mariah and stole from A. a piece of the innocence of childhood." He "used his position of trust to influence, to pr[e]y upon two girls who were too young to understand or protect themselves."

She reiterated Detective Rios's testimony that, during the interview with Mariah, Mariah said she "'was praying and asked God why this is happening.'" She noted, "Mariah was direct. She walked into the courtroom and tried not to look at the defendant. She sat with most of her back to him while she answered. She was bashful a[t] times." The prosecutor argued Mariah "acted the way that you might expect a 12 year old to act"

and "she was quieter" when asked about defendant sodomizing her. "A[.] and Mariah have carried and will carry the burden of what [defendant] did to them, but at least they don't have to feel the weight of the secret that this man who was posing as a grandfather to them violated their trust, their innocence, and their safety."

2. Analysis

Citing these portions of defendant's closing argument and the comments discussed *ante*, defendant contends "[t]he prosecutor urged jurors to be moved by complainants' visible discomfort" and "that complainants would not endure indignities and ordeals of pursuing prosecution unless their accusations were true."

It is true "'that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial.'" (*People v. Jackson* (2009) 45 Cal.4th 662, 691.) But, here, the prosecutor did not ask the jury to step into the complainants' shoes or imagine their suffering, and we cannot conclude the challenged statements exceeded the bounds of proper argument.

Specifically, the prosecutor's description of defendant as "a violent, sexual predator" who "used his position of trust to pr[e]y upon two girls" did not constitute misconduct.

> "We have observed that a prosecutor is not 'required to discuss his [or her] view of the case in clinical or detached detail.' [Citation.] … 'A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' [Citation.] We have repeatedly rejected claims of prosecutorial misconduct involving the use of such epithets in guilt phase arguments. [Citations.]" (*People v. Tully*, *supra*, 54 Cal.4th at p. 1021.)

Here, we conclude the prosecutor's epithets, which were fleeting characterizations in the course of the prosecutor's very lengthy summations, did not constitute misconduct. (E.g., *People v. Tully*, *supra*, at p. 1021 [no misconduct occurred where prosecutor referred to defendant as "'a despicable excuse for a man,' a 'despicable individual,' 'garbage,' and

'a sucker'"]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251 [no misconduct where prosecutor referred to defendant as a "'perverted maniac'"]; *People v. Farnam*, *supra*, 28 Cal.4th at p. 168 [no misconduct where prosecutor referred to defendant during opening statement "as 'monstrous,' 'cold-blooded,'… and 'a predator'"].)

With regard to the remainder of the prosecutor's challenged comments, there was no misconduct. In determining the credibility of a witness, a juror is permitted to consider "any matter that has any tendency in reason to prove or disprove the truthfulness" of the witness, including the witness's "demeanor while testifying and the manner in which [the witness] testifies." (Evid. Code, § 780, subd. (a).) Thus, it was not misconduct for the prosecutor to comment on A.'s and Mariah's demeanors while they testified. And the rest of the prosecutor's challenged statements, including those discussed *ante*, were fair comments on the evidence presented at trial.

Additionally, the court instructed the jury: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments the attorneys discuss the case, but their remarks are not evidence" and "Do not let bias, sympathy, prejudice, or public opinion influence your decision." We presume the jury followed these instructions. (Accord, *People v. Edwards* (2013) 57 Cal.4th 658, 764 [presuming jury will follow instruction that statements of attorneys are not evidence]; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184 ["Further, the court instructed the jury that questions and statements by the attorneys do not constitute evidence, and the jury is presumed to follow the court's instructions"]; *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 857 [presuming jury followed instruction not to be influenced "'by sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling'"].) Thus, we find no prejudicial misconduct.

D. Alleged Argument "Justice Required Conviction"

Defendant next challenges the prosecutor's statements in rebuttal in which she argued: "The evidence in this case demands the 12 of you hear the cries of A[.] and Mariah and find the only reasonable conclusion supported by the facts is that the defendant is guilty as charged." He contends the prosecutor's arguments suggested to jurors they "had a duty to convict" and "should return a verdict based on extrinsic factors, rather than strictly on the basis of the trial evidence."

Contrary to defendant's argument, here the brief-cited argument was in the context of the prosecutor's rebuttal in which she was urging the jury to find defendant guilty based on the evidence presented at trial, and the prosecutor was entitled to argue the evidence supported conviction. Such remarks were not reprehensible or deceptive and did not invite the jury to consider a speculative matter beyond the evidence. We also cannot conclude defendant was prejudiced by the prosecutor's brief, isolated comment made in the context of her rebuttal, particularly given the strong evidence inculpating defendant. (E.g., *People v. Medina* (1995) 11 Cal.4th 694, 759–760 [no prejudice caused by prosecutor's urging to "'do the right thing, to do justice, not for our society, necessarily or exclusively, but for [the victim]'"].)

E. Alleged "Vilifying Of Defense Counsel"

Defendant next contends the prosecutor attacked his right to effective legal representation by vilifying his counsel "for asserting bases for finding reasonable doubt to support acquittal."

1. Relevant Factual Background

The prosecutor argued in rebuttal she had proven defendant's guilt beyond a reasonable doubt, emphasizing in part:

> "What about that pretext call? That is a bad call. That is a bad call for the defendant because an innocent person doesn't respond to those allegations in the way that the defendant responded. What about the physical, medical findings? In addition to easily making up the story, did A[.] self-harm so

> that she could have some physical evidence to support her story? It's—that idea is ridiculous. What the defendant has presented to you is an imaginary doubt. It's an insult to the two girls who came in and talked about the most traumatic events of their lives, and it's an insult to the truth."

2. Analysis

Defendant contends the referenced rebuttal argument "vilified defense counsel for asserting bases for reasonable doubt to support acquittal." The People respond "the prosecutor was simply responding to defense counsel's attack on the victims."

Although it is misconduct to attack the defendant's attorney personally (*People v. Hill*, *supra*, 17 Cal.4th at p. 832), including challenging the attorney's personal honesty (see *People v. Bemore* (2000) 22 Cal.4th 809, 846), it is not misconduct to challenge "the persuasive force of defense counsel's closing argument." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1155, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) And our Supreme Court has "found no impropriety" in prosecutorial remarks similar to those alleged here. (See *People v. Zambrano*, *supra*, at p. 1155.) Such remarks include statements that a defense is "'ridiculous'" and "'outrageous'" (*People v. Stitely* (2005) 35 Cal.4th 514, 559–560), that defense counsel "was arguing out of both sides of his mouth" and that this was "'great lawyering'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215–1216), and that defense counsel's job is to "'confuse'" and "'throw sand in your eyes,'" and counsel "'does a good job of it'" (*People v. Bell* (1989) 49 Cal.3d 502, 538). It has also been found acceptable to argue that defense counsel "'tried to smoke one past us'" (*People v. Huggins* (2006) 38 Cal.4th 175, 207), and to call the defense a "'smokescreen'" (*People v. Stitely*, *supra*, at pp. 559–560).

As in those cases, here, "we see no improper attack on counsel's integrity, but only on the merits of his trial tactics and arguments." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1155.) The challenged argument "did little more than urge the jury not to be influenced by [defense] counsel's arguments, and to instead focus on the testimony and evidence in the case." (*People v. Stanley* (2006) 39 Cal.4th 913, 952 [prosecutor did not

commit misconduct during guilt phase rebuttal argument when he told jury defense counsel "'imagined things that go beyond the evidence'" and told a "'bald-faced lie'"].) Accordingly, the prosecutor's comment did not constitute misconduct.

F. Vouching for the Credibility of Complainants

Defendant further contends the prosecutor committed misconduct by vouching for the complainants' credibility.

1. Relevant Factual Background

During her closing and rebuttal, the prosecutor argued:

> "Thankfully A[.] and Mariah were able to muster up strength to say what the defendant had done to them. And they came into the courtroom with more resolve than most adults, sat a couple feet away from their molester and answered detailed questions about the man who they thought was their grandfather who had begun touching them, having sex with them when they were eight and nine years old. [¶] … [¶]
>
> "And I submit to you that both A[.] and Mariah were credible. They came in. They answered the questions as best they could. We asked a lot of them. We asked a lot of them. And they didn't remember every detail. When they didn't remember a detail, each of them said they didn't remember the detail. They didn't try to make something up, or exaggerate what happened. They told you about what their relationship was like with the defendant outside of the sexual assault that he was committing. [¶] … [¶]
>
> "There were times that [Mariah] couldn't honestly remember the details. I think it's reasonable based on the way that she testified to believe there were times that she didn't want to think about the details, that she suppressed some of the details, that she was embarrassed or bashful about describing exactly what it meant to be sodomized, that she gave the bare minimum of what happened to her and wasn't going to describe the act in detail and that would give it more credibility frankly. [¶] This was not a child who was coached in [*sic*] and came in and gave a medically accurate account of what happened to her. This is a child who wanted nothing to do with this, who never wanted to be interviewed, who never wanted to have to come into court and talk about this. But she was unequivocal in what happened to her.

"[Mariah] said to Detective Rios when asked what were you thinking while this was happening, and she said 'I was praying and asked God why is this happening.' That's not something that an eight, nine, 10 year old makes up. [¶] … [¶]

"[Mariah] looked at the defendant when she had to identify him. And I submit to you that was a very sincere moment. That was not acting, that Mariah was incredibly uncomfortable about what she had to do during this trial. But she did her best and she answered the questions directly.

"… This applies to Mariah and to A[.] They—I think it was clear that they would rather not have to do this if they didn't have to. There was no joy in reporting this to the police and being interviewed over and over and coming into a room of strangers and telling these stories again. And there was nothing to be gained from it. [¶] … [¶]

"… [Mariah and A.] have absolutely no reason to make this up."

2. Applicable Law

A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them, but may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record. (*People v. Martinez* (2010) 47 Cal.4th 911, 958; *People v. Turner* (2004) 34 Cal.4th 406, 432–433.) Impermissible "vouching" of a witness may occur when a prosecutor places the government's prestige behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1207.)

3. Analysis

Defendant argues the prosecutor committed misconduct by improperly vouching for the credibility of Mariah and A. The People respond the prosecutor's argument was properly based upon the evidence presented at trial and, even if there was misconduct, defendant was not prejudiced. We agree with the People.

"Although a prosecutor may not personally vouch for the credibility of a witness, a prosecutor may properly argue a witness is telling the truth based on the circumstances of the case." (*People v. Boyette* (2002) 29 Cal.4th 381, 433.) Based on the record before us, the prosecutor's discussion of Mariah's and A.'s testimonies and their demeanors while testifying was a fair comment on the evidence presented at trial and reasonable inferences that could be drawn therefrom. Additionally, the prosecutor's related argument that these witnesses lacked motivation to lie was based on inferences that could be drawn from the evidence presented. (See *ibid.* [prosecutor's argument regarding witnesses' credibility and lack of motivation to lie was permissible because it was based on the circumstances of the case and inferences from the evidence presented].) Thus, we cannot conclude such argument constituted improper vouching.

G. Alleged Shifting of Burden of Proof by Prosecutor

Defendant further contends the prosecutor improperly shifted the burden of proof during her closing rebuttal.

1. Relevant Factual Background

In her rebuttal, the prosecutor noted, "I have an obligation to prove the charges in this case beyond a reasonable doubt.… Proof … that leaves you with an abiding conviction that the charge is true." She then argued:

> "The defendant's presentation of reasonable doubt is that A[.] is a liar, that Mariah is a liar. But there are some inconvenient facts in addition to the testimony of these two girls, these two girls who have absolutely no reason to make this up. And it was suggested that this was made up, that this was a complete lie. You did not hear one piece of evidence in this entire trial, even the slightest hint or suggestion as to why these girls would one day say 'My grandpa's been sodomizing me. My grandpa's been having sex with me. He does it in the house where people are present. He does it in the bed where people are present.' Why would they make those details up?"

2. Analysis

Defendant asserts the referenced argument was misconduct because the prosecutor attempted to shift the burden of proof to defendant to "prove complainants had motives to fabricate accusations."

In *People v. Bradford* (1997) 15 Cal.4th 1229, the Supreme Court concluded the prosecutor did not commit misconduct during closing argument by making "brief comments" noting the absence of evidence contradicting the prosecution's evidence and the defense's failure to present material evidence or alibi witnesses. (*Id*. at p. 1339.) It rejected defendant's argument the prosecutor's comments "impermissibly shift[ed] the burden of proof to defendant." (*Id*. at p. 1340.) Rather, it held "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*Ibid*.)

Here, the prosecutor argued no evidence was produced to establish why A. and Mariah would lie about their grandfather molesting them. The prosecutor did not argue defendant had a burden to produce any evidence or to prove his innocence and, rather, reiterated the prosecution bore the burden of establishing defendant's guilt beyond a reasonable doubt. This brief comment referring to defendant's failure to introduce material evidence or to call logical witnesses was proper. (*People v. Wash* (1993) 6 Cal.4th 215, 262–263; *People v. Ratliff* (1986) 41 Cal.3d 675, 690–691.) As in *People v. Bradford*, *supra*, 15 Cal.4th 1229, it did not impermissibly shift the burden of proof to defendant. (See *id.* at p. 1340.)

H. Alleged Argument Regarding Facts Not in Evidence

Defendant further contends the prosecutor argued, without supporting evidence, "People have an impressive ability to tell when somebody's being sincere." The People note the prosecutor's referenced comment was followed by the following statements: "And this is what a trial, a search for the truth asks of you. Apply your common sense,

your reasoning, to what you heard in court and decide what you believe to be true." They respond the challenged "comment was not a legal or evidentiary pronouncement, but rather, simply a restatement of the jury instructions that "'[i]n deciding whether testimony is true and accurate, use your common sense and experience.'"

It is true that it is generally misconduct for a prosecutor to refer to facts not in evidence during argument. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 827–828.) But "[c]ounsel may argue facts not in evidence that are common knowledge or drawn from common experiences." (*People v. Young* (2005) 34 Cal.4th 1149, 1197; see *People v. Hill*, *supra*, at p. 819.) When evaluating claims of improper argument to the jury, """""the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.""""" (*People v. Adams* (2014) 60 Cal.4th 541, 568.)

Here, the prosecutor's challenged statement could be construed as a generalized fact drawn from common experience or, in context, a permissible inference that could be drawn from the provided jury instruction that states, "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience." (See CALCRIM No. 226.) Counsel was not suggesting any facts unknown to the jury; rather, in context, the argument was essentially an appeal to common sense. Thus, we find no misconduct. (E.g., *People v. Mendoza* (2016) 62 Cal.4th 856, 907–908 [prosecutor's argument "'nobody who goes out and intentionally takes a life does it when they're all right in the head'" (italics omitted) was not misconduct but rather "an appeal to common sense"].)

I. Alleged Improper Victim Impact Argument

Finally, defendant repackages some of his earlier complaints to argue "[t]he prosecutor repeatedly appealed to jurors to consider the impact of the charged offenses and prosecution upon complainants as a factor favoring conviction." Referring to the

portion of the prosecutor's opening statement cited in part III.B, *ante*, he asserts the prosecutor "told jurors that requiring the complainants to fulfill their witness obligation … was 'asking too much of them.'" Defendant further contends "[t]he prosecutor during argument urged jurors to consider [the] impact upon complainants as a factor favoring conviction" and "told jurors that [defendant] stole A[.]'s childhood innocence." He also challenges the prosecutor's argument "that the complainants must carry the burden of what was allegedly done to them."

As discussed, we have already concluded the challenged comments did not amount to misconduct but, rather, fell within the bounds of permissible argument.

Furthermore, even assuming error, we cannot conclude there is a reasonable probability the result of the proceeding would have been different if any of the challenged statements had been objected to and excluded. Here, the uncontroverted evidence established defendant repeatedly abused his minor granddaughters over a period of years. Both complainants testified to the abuse and K. testified to seeing defendant abuse A. The jury also had before it K.'s phone call with defendant during which defendant, faced with allegations of abuse, did not deny the allegations. The jury also had before it medical evidence corroborating A.'s allegations that she had been sexually abused. Additionally, the court instructed the jurors the attorneys' "remarks are not evidence" and not to "let bias, sympathy, prejudice, or public opinion influence [their] decision." Presuming the jury followed the trial court's instructions, and considering the strength of the People's evidence inculpating defendant and the brevity of the prosecutor's discussion in context, we cannot conclude it is reasonably probable the trial outcome was affected by alleged prosecutorial misconduct.

Accordingly, we reject defendant's contentions of IAC for failing to object to alleged prosecutorial misconduct.

IV. Imposition of Parole Revocation Fine

At the sentencing hearing, the court imposed and stayed a $10,000 parole revocation fine pursuant to Penal Code section 1202.45. This fine is reflected in the defendant's abstract of judgment.

Defendant argues the trial court erred in imposing and suspending the $10,000 parole revocation fine. Citing Penal Code section 1202.45, defendant contends "[t]he parole-revocation-fine statute expressly and clearly requires that the imposed sentence include a parole period as a prerequisite to imposing the fine." He argues it is established "that a defendant who has been sentenced to a term of life without the possibility of parole with no determinate terms is not subject to the parole revocation fine." The People respond defendant's "indeterminate sentence carried with it a possibility of a period of parole and mandated imposition of the section 1202.45 parole revocation restitution fine." We agree with defendant.

While a Penal Code section 1202.45 parole revocation fine is required when a section 1202.4 restitution fine is imposed, such a fine is not authorized when the sentence does not encompass a period of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183–1186 (*Oganesyan*) [parole revocation fine not authorized where defendant sentenced to life without possibility of parole in addition to indeterminate term]; cf. *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*) [parole revocation fine proper where defendant, in addition to being sentenced to death, also sentenced to determinate term].)

In *Oganesyan*, the defendant was sentenced on count 1 to an indeterminate term of 15 years to life for second degree murder, plus an additional four-year term for a firearm use enhancement. (*Oganesyan*, *supra*, 70 Cal.App.4th at pp. 1181, 1184.) On count 2, he was sentenced to life without the possibility of parole plus 10 years for a first degree special-circumstances murder with a firearm use enhancement (count 2). (*Id.* at p. 1181.) Although the trial court imposed a restitution fine pursuant to Penal Code section 1202.4,

the People claimed the court erred by failing to impose a section 1202.45 parole revocation fine. (*Oganesyan*, at p. 1181.) The defendant agreed if the fine applied to him, the trial court had a jurisdictional duty to impose it. (*Id.* at p. 1182.) The defendant argued the section 1202.45 fine did not apply, however, because he received a sentence of life without the possibility of parole, a sentence for which there is no possibility of parole. (*Oganesyan*, at p. 1182.) The Court of Appeal agreed with the defendant. (*Id.* at pp. 1184–1186.) The court held the issue was a matter of statutory interpretation, explaining:

> "When there is no parole eligibility, the [Penal Code section 1202.45] fine is clearly not applicable. The statutory language itself is clear, the additional restitution fine is only imposed in a 'case' where a sentence has been imposed which includes a 'period of parole.' [Citation.] Simply stated, the … legislative intent which can be derived from the language of the statute is clear; if there is no parole eligibility, no section 1202.45 fine may be imposed." (*Id*. at p. 1183.)

The court acknowledged the defendant could conceivably be eligible for parole based on his sentence of 15 years to life for second degree murder plus the additional firearm use enhancement. (*Oganesyan, supra*, 70 Cal.App.4th at p. 1184.) Nonetheless, it rejected the People's argument that this was a case in which a sentence had been imposed that included a "period of parole." (*Id*. at pp. 1183–1185.)

The People contend our Supreme Court's decision in *Brasure*, *supra*, 42 Cal.4th 1037 casts doubt on *Oganesyan*. In *Brasure*, the trial court sentenced the defendant to death on count 1, stayed execution of sentence on four other counts pursuant to Penal Code section 654, and imposed an aggregate determinate prison term of two years eight months on the remaining counts. (*Brasure*, *supra*, at p. 1049.) The trial court also imposed and suspended a parole revocation fine under section 1202.45. (*Brasure*, at p. 1075.) On appeal, the defendant argued the fine was unauthorized. (*Ibid*.)

Our Supreme Court held the fine was required, explaining that although the defendant was sentenced to death on count 1, he received a determinate prison term

sentence under Penal Code section 1170 on other counts. (*Brasure*, *supra*, 42 Cal.4th at p. 1075.) Section 3000, subdivision (a)(1) provides that a determinate prison term under section 1170 "shall include a period of parole." In turn, the fine under section 1202.45 must be imposed "'[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole." (*Brasure*, at p. 1075.) The fine was therefore required, though it was ordered suspended unless the defendant was released on parole and his parole was revoked. (*Ibid*.)

The *Brasure* court held *Oganesyan* was distinguishable because it did not involve a determinate term imposed under Penal Code section 1170, but involved a life without the possibility of parole sentence for first degree special-circumstance murder and an indeterminate life sentence for second degree murder. (*Brasure*, *supra*, 42 Cal.4th at p. 1075.) The court recognized the defendant in *Oganesyan* as well as the defendant in *Brasure* were both unlikely to ever be released on parole but held the defendant's determinate sentence in *Brasure* by law required imposition of the suspended parole revocation restitution fine.

Accordingly, our Supreme Court has chosen to draw a distinction between indeterminate sentences with the possibility of parole and determinate terms (*Brasure*, *supra*, 42 Cal.4th at p. 1075), and we are bound by the court's holding (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455). Here, defendant was sentenced to life without the possibility of parole, in addition to an indeterminate term of 270 years to life. He was not sentenced to any determinate term. Thus, under *Brasure* and *Oganesyan*, the defendant was not subject to a Penal Code section 1202.45 fine because he did not receive a sentence with a determinate term. (See *Oganesyan*, *supra*, 70 Cal.App.4th at pp. 1183–1184; *People v. Brasure*, *supra*, at p. 1075.) Thus, the fine should not have been imposed (and suspended) in this instance.

DISPOSITION

The imposed and suspended $10,000 parole revocation fine (Pen. Code, § 1202.45) is ordered stricken. The trial court is ordered to prepare an amended abstract of judgment reflecting this change and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____

PEÑA, J.

WE CONCUR:

_____

POOCHIGIAN, Acting P.J.

_____

DETJEN, J.